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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH G. SMITH,

Petitioner,

—against—

JOHN LEHMAN, Secretary of the Navy, Washington, D.C. and the United States Department of the Navy,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

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QUESTION PRESENTED

Whether a probationary Federal employee, who is discharged for allegedly supplying false information on an employment form, has a liberty right in his good name and future employment possibilities meriting the holding of a hearing wherein the employee may show that the information was either not false in fact, or that he labored under a bona-fide misapprehension when he answered falsely.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit is reported at 689 F.2nd 342 (1982) and is printed in Appendix A hereto, *infra*, page 1. The prior judgment of the United States District Court for the Eastern District of New York is printed in Appendix A hereto, page 8.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit (Appendix A *infra*, page 1) was decided on September 15, 1982. The jurisdiction of the Supreme Court is invoked pursuant to 28 USC Sec. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner brought this action following a wrongful dismissal from the Naval Investigative Service, seeking reinstatement and money damages, including back pay. Petitioner was hired as a Special Agent on October 6, 1980. He was dismissed on December 12, 1980, while still in a probationary status. Respondents moved for Summary Judgment and petitioner opposed this motion. Judgment was entered by respondents on March 1, 1982, pursuant to an Opinion and Order by Judge McLaughlin granting the respondents Summary Judgment. Petitioner filed an appeal contending that in so deciding, Judge McLaughlin erred.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court.

BACKGROUND

Petitoner, who was working for the New York State Deputy Attorney General's Office as a Special Investigator, applied for a position with NIS as a Special Agent. He was hired by NIS (Naval Investigative Service) on October 6, 1980, after an interview and background investigation. As part of security clearance procedures, on October 10, 1980, petitioner completed "DD Form 398", which encompasses the employee's personal history. In November 1980, petitioner was asked to sign a waiver releasing all records to the Defense Investigative Service ("DIS"). He refused on advice of counsel.

The DIS investigation revealed what appeared to be a misleading or erroneous statement on two distinct parts of DD Form 398.* Petitioner was told by his supervisor that NIS

* In response to item 18, which inquires into prior arrests, plaintiff wrote: "08-01-80 Disorderly Conduct, Albany Police Court, Albany, New York, Judge KEEGAN presided. Case dismissed."

In response to item 13, concerning why he left his job with the New York State Deputy Attorney General's Office, petitioner wrote: "Not a permanent agency." The Deputy Attorney General's Office, however, had asked him to resign the day it learned of his arrest.

undertake an independent investigation and that petitioner would be requested to furnish a sworn statement. On December 9, 1980 the Regional Director of Operations attempted to question the petitioner and petitioner refused to make any statements at that time upon advice of counsel.

Petitioner was fired on December 12, 1980. The letter from the Acting Director of NIS notifying petitioner of his dismissal states that he was removed for "falsification of an official record." On the effective date of termination, petitioner expressed a desire to hold a meeting between the parties and their attorneys. The request was denied. In January, 1981, petitioner wrote Edward J. Hidalgo, who was then Secretary of the Navy, requesting that he be reinstated. The request was denied. The district court found that petitioner had not been employed since his discharge from the Navy.

Petitioner alleges that the information supplied on DD Form 398 was "honest and true" and claims that respondent's actions were arbitrary and capricious, were not in accord with applicable law and regulations, and deprived him of his Fifth Amendment right to a hearing. The statute pursuant to which petitioner was dismissed requires an *intent* to falsify, an essential element that is absent in petitioner's case. 18 U.S.C. Sec. 1001.

Petitioner had honestly and sincerely believed his statement to be an accurate statement of the outcome of his arrest. Actually, a charge of official misconduct had been dismissed and a charge of criminal impersonation had been reduced to disorderly conduct, to which petitioner pled guilty. The file was to be sealed. Prior to his dismissal, petitioner was never accorded a hearing or an opportunity to call witnesses to substantiate his claim that his mis-statement was the result of an honest misunderstanding of the Court procedures in which he was involved.

Petitioner claimed below that his dismissal in the absence of substantial evidence to support the charge, and the respond-

ents' denial of a hearing, was arbitrary and capricious, an abuse of discretion without rational basis, and violative of his Constitutional rights.

Respondents moved for Summary Judgment and petitioner opposed this Motion. Judge McLaughlin issued an Opinion, (Appendix A) granting the respondents' motion for summary judgment.

THE RULINGS BELOW

The district court ruled that summary judgment must be granted to the respondents because neither a property interest nor a liberty interest was implicated in this case. The district court ruled that a probationary employee, like the petitioner, has no entitlement to continued employment. The court further held that petitioner was notified and dismissed in accord with procedural regulations and was entitled to no more protection. The district court further held that petitioner had no protected liberty interest since there was no claim that the stigmatizing information was made public. For these reasons, the court held that petitioner suffered no due process deprivation.

The Court of Appeals expressed agreement with the district court's holdings since petitioner failed to raise a triable issue of material fact concerning his claim that he was deprived unconstitutionally of liberty and property interests.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED SINCE AN IMPORTANT QUESTION OF FEDERAL LAW SHOULD BE SETTLED BY THIS COURT:

The courts below recognized that an opportunity to be heard is essential where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." (*Board of Regents v. Roth,* 408 U.S. 564, 573, quoting *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). This right arises out of the due process need of the subject of government action to vindicate his rights to his name and reputation, which has been termed the "liberty interest." In *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093 (1981), the court noted that the boundary of liberty interests has been set at "accusations of moral turpitude such as dishonesty or immorality. . ." *Id.* at 1101. This is the very essence of the charge levied against petitioner.

The Court below, however, held that petitioner herein was not deprived of any due process protection because the *stigmatizing information was not false.* In so finding, the Court short-cut the purpose which underlies the liberty interest need for a hearing, namely the opportunity for the petitioner to develop the facts which demonstrate the falsehood of the charge.

In a letter to petitioner's attorney, dated February 19, 1981, W.E. Carroll, Deputy Assistant, Secretary of the Navy, predicated petitioner's dismissal on the following basis:

> A false statement on the DD 398 is a violation of the U.S. Code and is inconsistent with the high standards demanded of a Naval Investigative Service Special Agent.

Falsification of a government document is a violation of 18 U.S.C. Sec. 1001. It was this section that the Naval Investiga-

tive Service claimed that petitioner violated. In fact, the N.I.S. forwarded its file to the United States Attorney's Office in Philadelphia for its prosecutorial opinion, although no charges were ever filed. A necessary element of the offense is that the falsification be done "knowingly and willfully." The Courts have repeatedly interpreted the words "knowingly and willfully" to require a subjective awareness on the part of the actor that this acts are in violation of the statute, and a specific intent to violate the statute. This interpretation has been uniformly applied to the area of Federal employment. See *United States v. May,* 625 F.2d. 186, 190 and footnote 2, (8th Cir. 1980). Petitioner has maintained throughout these proceedings that he was innocent of any intentional falsification. Clearly, then, there is a genuine issue of fact as to whether the NIS charge is true. The most fundamental due process concepts dictate that when an employee in the Federal Service is dismissed for violation of a criminal statute, involving moral turpitude, or the knowing issuance of a false statement, he should be afforded a meaningful opportunity to refute such a charge. In petitioner's case, such circumstances could only be shown by the opportunity for petitioner to present mitigating circumstances in his defense.

Assuming arguendo, that Government has a legitimate need to ensure efficient, nondisrupted service to the public and therefore possesses certain powers to dismiss an employee who is lazy, inefficient, insubordinate, or incompetent; then, concomitantly, the individual has both a liberty interest as enumerated in *Board of Regents v. Roth,* 408 US 564 (liberty encompasses an employee's interest in his good name and integrity and in avoiding the stigma of discharge with concomitant diminution of further job prospects, *see* e.g. *Hopstrop v. Board of Junior College District No. 515,* 471 F.2d 488, loss of job deemed a "liberty" interest) and a property interest in keeping his or her employment, as enunciated in *Bell v. Burson,* 402 US 535, 539.

At the threshold level, to determine whether due process requirements attach, the *nature* of the interest at stake must be ascertained.

> ". . .The Court has also made clear that that property interests protected by procedural due process extend well beyond actual ownership of real estate chattles and money . . . the Court has required due process protections for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process . . . For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning. *Board of Regents v. Roth, supra.*

Although the Supreme Court of the United States has eschewed placing constraints and rigidly defining the words "liberty" and "property" within the context of the Due Process Clause, the Court has held:

> "Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, *to engage in any of the common occupations of life.*" (emphasis added) . . . generally to enjoy those privileges long recognized . . . *as essential to the orderly pursuit of happiness by free men,* (emphasis added, *Meyer v. Nebraska,* 262 US 390, *In a Constitution for a free people, there can be no doubt that the meaning of 'liberty'* must be broad indeed, (emphasis added), *Board of Regents v. Roth, supra, Bolling v. Sharpe,* 347 U.S. 497; *Stanley v. Illinois,* 405 U.S. 645.

Dismissal from public employment for cause may implicate liberty interests in imposing upon the discharged employee a stigma of incompetence or wrongdoing that forcloses "his freedom to take advantage of other employment opportunities." *Arnett v. Kennedy,* 416 U.S. 134 (1974); *Roth, supra; see, Wisconsin v. Constantineau,* 400 U.S. 433 (1971).

Justice Marshall, in the case of *Arnett v. Kennedy,* affirmed by a severely divided court, spoke in dissent, strongly asserting the cardinal principle that due process requires a balancing of the Government's asserted interest against those of the discharged employer. Further, he stated that the interests of a

public employee in secure Government employment, "are as weighty as other interests which . . . require at least rudimentary protection of a evidentiary hearing as a precondition to termination," citing *Board of Regents v. Roth, supra* at 212-213, among a long litany of cases for the proposition that:

> "This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen . . . Employment is one of the greatest, benefits that governments offer in modern day life."

Dismissal from public employment for cause may therefore, implicate liberty interests in imposing on the discharged employee a stigma of incompetence and/or wrongdoing that forecloses "his freedom to take advantage of other employment opportunities." *Roth, supra,* at 573; *see Wisconsin v. Constantineau,* 400 U.S. 433. Particularly, as in the case at bar, dismissal from the NIS carries ramifications far beyond those associated with a position of a less sensitive nature.

Clearly, dismissal from the Naval Investigative Service places a heavy burden upon the dismissed Special Agent which inevitably must foreclose his freedom to take advantage of other employment opportunities. Although it is likely that petitioner would encounter little difficulty if he now opted for a career as cab driver or milkman, that is not the test. In *Mervin v. Federal Trade Commission,* 591 F.2d 821, 828 (1978), the Court found that a due process violation would arise if "circumstances of this *dismissal were such as would* effectively foreclose his *opportunities to obtain future employment in his profession.*" *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). (emphasis added).

Petitioner's chosen profession is federal investigative work. A perusal of his employment history reveals that he has been grooming himself for this position in Navy intelligence for several years. Since graduation from college he has worked for the New York State Deputy Attorney General's Office doing investigative and intelligence work and he has also worked for

the Federal Bureau of Investigation as confidential clerk. His career prospects will be severely hampered due to his dismissal on a ground implying moral turpitude, especially where it stands unchallenged.

Applicants for positions with such elite government agencies as the NIS are subject to the strictest scrutiny. Although there was no publication at the time of petitioner's termination, it would be ludicrous to suggest that petitioner would be able to seek similar employment without disclosure of the stigmatizing information. This is necessarily so because of the top secret security clearance required for the position. Thus, actual publication should not be a prerequisite to the invoking of due process rights in this case, particularly because of the inevitability of publication if petitioner is to seek employment in his profession. Moreover, an operative of the NIS has a highly specialized and non-transferable training. An individual who is stigmatized as is the petitioner, and who seeks new employment outside his specialized field, has a few, if any, employment opportunities, and most certainly finds a barrier due to his past unfavorable and unsavory dismissal from a highly regarded intelligence agency of the United States.

Given the scope of the liberty interest herein, and the inevitable ramifications of its denial, the dismissed employee must be afforded the opportunity to ascertain and test the strength of the evidence of his alleged misconduct by confrontation and cross examination of all party witnesses and by the opportunity to present exculpatory or other witnesses in his own behalf. *See Arnett v. Kennedy*, 416 U.S. 134 (1974).

The inadequacy of the procedure afforded petitioner is demonstrated most clearly by the following facts. On December 12, 1980, the effective date of his termination, petitioner requested an opportunity to meet with his supervisors and his attorney. This request was denied. When Smith refused to answer questions without an attorney, in view of the graveness of the charge, he did not know, and could not know, that he was waiving forever his right to refute such charge. Yet, this is

the result of the holding of the Court below. Petitioner submits that this holding violates the fundamental principal of due process.

Such circumstances deserve special attention in view of the fact that *Codd v. Velger,* 429 U.S. 624 (1977) the case most heavily relied upon by the Court below, was decided by a 5 to 4 decision with a vigorous dissent. In *Codd,* a police officer challenged his dismissal from his nontenured position with the New York City Police Department. The Court held he was not entitled to a hearing, and thus no liberty rights were violated, because *respondent did not challenge the substantial accuracy* of the *"stigmatizing" information in his report.* The following quote from the dissenting opinion of Justice Stevens bears particular significance in the instant proceedings:

> Today's holding may have the unfortunate effect of encouraging public officials to deny hearings when they feel confident of the correctness of their decision. But, in Mr. Justice Frankfurter's oft-quoted words: 'That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.' *Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 171-172 (concurring opinion).
>
> As the last sentence in this quotation demonstrates, if state action has consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty, it is essential that fair procedures be followed for reasons that have nothing to do with the merits of the individual case. Today's holding is only a minor impair-

> ment of this principle. But the principle is one that admits of no compromise.

Codd v. Velger, 429 U.S. at 636. (Stevens, J., dissenting).

Therefore, procedural due process requires some form of hearing in the nature of either a pre- or post-dismissal category to satisfy constitutionally guaranteed liberty interests. We believe that the Court of Appeals narrowly construed "liberty interests" and ignored the stigmatizing nature of the facts underlying petitioner's dismissal. For these reasons, we believe that the district court's order should have been reversed.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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